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Supreme Court, U.S.
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No.

Supreme Court of the United States

ROBERT FLARIDA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT FLARIDA
09192-112
3705 West Farm Road
Lompoc, CA 93436

QUESTIONS PRESENTED

1.) Whether, this Court should find plain error in petitioner's sentence under *Blakely v. Washington*, 124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573 (6-24-04) because petitioner's sentence was substantially enhanced based on facts not charged in indictment, not submitted to a jury, and not proven beyond a reasonable doubt or admitted by petitioner, where the enhancements were vigorously contested, the evidence was anything but 'overwhelming', and the *Blakely* decision was handed down subsequent to the decision by the Ninth Circuit on direct appeal?

2.) Whether, as the Court of Appeals for the Seventh Circuit has held, in conflict with the decision below, a defendant cannot be convicted for mail fraud and wire fraud unless there is a specific false statement made and transmitted in interstate commerce?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit.

More specifically, the Petitioner Robert Flarida and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

A separate decision was handed down in a related case, however. That case was *United States v. Woods*, 335 F.3d 993; 2003 U.S. App. LEXIS 14054 (9th Cir. 7-14-03). (Appendix D) The parties to that proceeding were UNITED STATES OF AMERICA, Plaintiff-Appellee, DOREEN WOODS, aka Joann Barnes, Defendant-Appellant, and JASON GARCIA, aka Michael Bennett, Defendant-Appellant.

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PETITION FOR A WRIT OF CERTIORARI

Robert Flarida, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on 5-26-04.

OPINIONS BELOW

The 5-26-04 opinion of the Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 2004 U.S. App. LEXIS 10490 and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Central District Of California, entered on 1-23-02, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States District Court for the Central District Of California denying a new trial, is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment of the United States Court Of Appeals for the Ninth Circuit in the related case of *United States v. Woods*, 335 F.3d 993; 2003 U.S. App. LEXIS 14054 (9th Cir. 7-14-03), is a published decision, and is reprinted in the separate Appendix D to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 5-26-04. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

18 U.S.C. § 1341 provides:

> § 1341. Frauds and swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything

represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both. *Id.*

18 U.S.C. § 1343 provides:

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be

fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both. *Id.*

U.S.S.G. § 1B1.3 provides in relevant part:

> **§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**
>
> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Fed. R. Crim. P. 52 provides:

Rule 52. Harmless Error and Plain Error.

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. *Id.* (As amended Dec. 26, 1944, eff. March 21, 1946.)

STATEMENT OF THE CASE

On 9-5-00, petitioner Robert Flarida was charged in an Amended First Superseding Indictment with violation of 18 U.S.C. § 1341, 18 U.S.C. § 2326, and 18 U.S.C. § 2 (mail fraud) (Counts 1-4, 6-8, 10, 43, 46-48); 18 U.S.C. § 1343, 18 U.S.C. § 2326, and 18 U.S.C. § 2 (wire fraud) (Counts 11-16, 18-20, 22, 49, 52-54); 18 U.S.C. § 1956(a)(1)(A)(i), 18 U.S.C. § 2 (money laundering) (Counts 23-33).

While the indictment charged numerous acts alleged to be violative of the statutes, the indictment did not charge a leadership "role in the offense" or "obstruction of justice" or "vulnerable victim" as those terms are construed in U.S.S.G. § 3B1.1 and U.S.S.G. § 3C1.1 and U.S.S.G. § 3A1.1.

The gravamen of the charges was that Mr. Flarida's telemarketing business had crossed the line to become a "scheme" and that Mr. Flarida had deposited the proceeds of the so-called "scheme" in bank accounts and used the proceeds to pay the expenses of his telemarketing business.

At the close of evidence, the evidence was such that a reasonable jury could have found that no false statement had ever been made and/or transmitted in interstate commerce by Mr. Flarida to the clients of the telemarketing.

In fact, the evidence could easily have been construed by the jury is supporting the defense position that each and every step of the telemarketing program was *within* the law and constituted lawful commercial speech. This was acknowledged by the prosecutor at sentencing when she admitted that the "script" for the telemarketing was a "walking the line thing". (Tr. 1-18-02, page 47)

Since the jury could reasonably find that no false statement had ever been made to clients or transmitted in interstate commerce, counsel jointly moved for an instruction that, absent a finding of a false statement having been made or transmitted in interstate commerce, the jury should find

defendants not guilty. (Tr. 9-28-00, pages 211-257)[1] (See ER 193)[2] This instruction was denied. (Tr. 9-28-00, page 212) Over defense objection, the jury was instructed:

> A defendant's actions can constitute a scheme to defraud *even if there are no specific false statements involved*. The deception need not be premised upon words or statements standing alone. The arrangement of the words or the circumstances in which they are used may create an appearance which is false or deceptive, even if the words themselves fall short of this. Thus, even if statements as part of the scheme are not literally false, you may consider whether the statements taken as a whole were misleading and deceptive. Evidence beyond a reasonable doubt that a scheme was reasonably calculated to deceive is sufficient to establish a scheme to defraud.

(Tr. 10-3-00, pages 34-35)

While the indictment alleged certain amounts of money involved in the offense, the district court specifically instructed the jury as follows:

> ... the indictment alleges that an approximate amount of money was involved in the crimes charged. *It is not necessary for the government to prove the exact or the precise amount of money that's charged in the indictment*.

(Tr. 10-3-00, page 55) (emphasis added)

On 10-5-00 Mr. Flarida was found guilty by the jury as to violations of 18 U.S.C. § 1341, 18 U.S.C. § 2326, and 18 U.S.C. § 2 (mail fraud) (Counts 1-4, 6, 8, 10, 43, 46-48);

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[1] This refers to the trial transcript in this case dated 9-28-00, pages 211-257.

[2] This refers to the "Excerpts of Record" from the direct appeal of this case, page 193.

18 U.S.C. § 1343, 18 U.S.C. § 2326, and 18 U.S.C. § 2 (wire fraud) (Counts 11-16, 18, 20, 22, 49, 52-54); 18 U.S.C. § 1956(a)(1)(A)(i), 18 U.S.C. § 2 (money laundering) (Counts 23-33).

On 4-26-01, subsequent to the verdict, counsel moved for a new trial under Federal Rule of Criminal Procedure 33, pleading and arguing new evidence established the innocence of Mr. Flarida. (CR 354)[3] This motion was denied on 7-6-01. (Appendix C) (CR 361)

A Presentence Report was prepared. In the report, the Probation Officer recommended Mr. Flarida's sentence should be computed as follows:

1.) First, the Probation Officer recommended that the 1997 version of the Guidelines Sentencing Manual should be used to avoid what appeared to be an ex post facto problem with the 2000 version of the Guidelines Sentencing Manual based on the Probation Officer's preponderance of evidence determination that "mass marketing" and multiple vulnerable victim enhancements applied. The Probation Officer observed that the 2000 Guidelines Sentencing Manual had increased enhancements from the 1997 Guidelines Sentencing Manual where these facts were found by the court under the preponderance of evidence for sentencing. (PSI ¶75)[4]

2.) The Probation Officer recommended that the mail fraud and wire fraud counts be grouped separately from the money laundering counts. (PSI 77-80)

3.) The Probation Officer recommended the mail fraud and wire fraud counts be given a "Base Offense Level" of "6". This Base Offense Level was then enhanced 11 levels based on a preponderance of evidence determination that the "relevant conduct" under U.S.S.G. § 1B1.3 involved

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[3] This referse to the district court "Clerk's Record", entry #354.

[4] This refers to paragraph 75 of the sealed Presentence Report in this case.

$1,296,527.69 in losses to clients of the telemarketing. (PSI ¶83) This mail fraud and wire fraud offense level was then additionally enhanced 2 levels for "more than minimal planning (PSI¶ 85) and 2 levels for "violation of a judicial or administrative injunction not addressed elsewhere in the guidelines", (PSI ¶¶86-88) and enhanced 4 levels for "role in the offense" (PSI¶¶89-92) and enhanced 2 levels for "vulnerable victims" (PSI ¶¶98-99) and enhanced 2 levels for "obstruction of justice". (PSI ¶¶100-102). The enhancements to the mail fraud and wire fraud counts, utilizing preponderance of evidence and the 1997 Guidelines Sentencing Manual, resulted in an adjusted offense level of 29. (PSI ¶¶81-103)

4.) The Probation Officer recommended that the money laundering counts be given a Base Offense Level of 23 based on the 1997 Guidelines Sentencing Manual. The Probation Officer then recommended that this Base Offense Level be enhanced 4 levels based on a preponderance of evidence determination that $763,000 was deposited into bank accounts and used to operate the telemarketing business. (PSI ¶¶104-106) The enhancements to the money laundering counts, utilizing preponderance of evidence and the 1997 Guidelines Sentencing Manual, resulted in an adjusted offense level of 27. (PSI ¶¶104-110)

5.) Utilizing the "Multiple Count" adjustment, the Probation Officer recommended that 2 points be added to the mail fraud and wire fraud group and that this group be utilized to determine the Total Offense Level of 31 for sentencing Mr. Flarida. (PSI ¶¶111-116)

6.) Based on the forgoing preponderance of evidence determinations, the Probation Officer recommended a sentencing range under the United States Sentencing Guidelines of 108-135 with a 20 year maximum under the United States Code. (PSI ¶¶180-181)

Mr. Flarida vigorously contested each and every one of the proposed enhancements to his sentence.

On 1-18-02, Mr. Flarida appeared for sentencing. At the sentencing, the district court, utilizing the forgoing preponderance of evidence determinations, sentenced Mr. Flarida to 121 months incarceration plus 3 years supervised release, $1,296,527.69 restitution, and $3,250.00 special assessment for violations of 18 U.S.C. § 1341, 18 U.S.C. § 2326, and 18 U.S.C. § 2 (mail fraud) (Counts 1-4, 6, 8, 10, 43, 46-48); 18 U.S.C. § 1343, 18 U.S.C. § 2326, and 18 U.S.C. § 2 (wire fraud) (Counts 11-16, 18, 20, 22, 49, 52-54); 18 U.S.C. § 1956(a)(1)(A)(i), 18 U.S.C. § 2 (money laundering) (Counts 23-33).

Based on the facts found by the jury, Mr. Flarida would have been subject to a sentence of no more than 6 months incarceration for the mail fraud and wire fraud counts. Utilizing the 2001 Guidelines Sentencing Manual which was normally used for federal sentencing in January of 2002 and which *would* have been used but for the Probation Officer's preponderance of evidence determinations utilizing relevant conduct, Mr. Flarida's sentence calculations for money laundering would have been grouped *with* his mail fraud and wire fraud sentence calculations instead of being grouped separately.[5] Consequently, based on the facts found

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[5] See *United States v. Caplinger*, 339 F.3d 226; 2003 U.S. App. LEXIS 16418 **19-20 (4th Cir. 2003) (explaining that Amendment 634 to the Guidelines, which went into 11-1-01, "explicitly provides for grouping of money laundering counts and counts for the underlying offense under § 3D1.2(c), rather than § 3D1.2(d) as our court had previously allowed. ... The Amendment completely changes the way in which the offense level for money laundering is calculated. See U.S.S.G. § 2S1.1(a) (2001). Rather than setting base offense levels of 23 or 20 for money laundering like the earlier guideline, the amended guideline sets the base offense level at either the offense level for the underlying offense from which the laundered funds were derived or eight plus the number of offense levels from the table in § 2B1.1 (Theft,

by the jury and but for the facts found by the Probation Officer under the preponderance of evidence and relevant conduct, the money laundering sentence would also have reflected a sentence of no more than 6 months incarceration.

While Mr. Flarida's objections to enhancement were overruled, the evidence supporting the enhancements was *anything but* 'overwhelming'. This is apparent from the substance of the record as well as from the extensive sentencing proceeding, the filed objections, the counter objections and the responses to the objections to the Presentence Report.

Mr. Flarida demonstrates within that (A) this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; and (B) this Court should grant Mr. Flarida's Petition For Writ Of Certiorari to resolve a conflict among the United States courts of appeals as to the scope of the mail and wire fraud statutes; (C) the United States court of appeals for the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court; (D) the United States court of appeals for the Ninth Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.

Property Destruction, and Fraud) corresponding to the value of the laundered funds.").

REASONS FOR GRANTING THE WRIT

1.) **THIS COURT SHOULD GRANT MR. FLARIDA'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial

> proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States*, 318 U.S. 332 (1943).[6] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

1A.) The Lower Courts Increased And Affirmed The Increase In Petitioner's Statutory Maximum Sentence Based On Facts Not Charged In Indictment, Not Submitted To A Jury, And Not Proven Beyond A Reasonable Doubt Or Admitted Petitioner In Violation Of The Sixth Amendment And

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[6] See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

Blakely v. Washington, 124 S. Ct. 2531 (6-24-04).

In *Apprendi v. New Jersey*, 530 U.S. ___, 147 L.Ed.2d 435, 120 S.Ct. 2348, 2000 U.S. LEXIS 4304 (6-26-00), this Court held that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.

In *Blakely v. Washington*, 124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573 (6-24-04), the Court clarified that *Apprendi* applies anytime facts supporting a criminal defendant's sentence are neither admitted by the defendant in a plea colloquy nor found by a jury. The Court added that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *Id.* 2004 U.S. LEXIS 4573 at **14. (quoting *Ring v. Arizona*, 536 U.S. 584, 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002)). This clarification by *Blakely* has been construed by the lower courts as applying the *Apprendi* limitation to enhancement of guideline sentencing ranges. *Blakely*, 2004 U.S. LEXIS 4573 at **17 [n. 9].[7]

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[7] See *United States v. Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir. 7-9-04) (remanding for sentence reduction in drug case); *United States v. Ameline*, 2004 U.S. App. LEXIS 15031 (9th Cir. 7-21-04) (same); *United States v. Terrell*, 2004 U.S. Dist. LEXIS 13781 (D NE 7-22-04) (finding *Blakely* merely modified procedures and standard of proof for Guidelines and otherwise left them intact); *United States v. Ali Sher Khan*, 2004 U.S. Dist. LEXIS 13192 (ED NY 7-12-04) (Judge Weinstein) (ordering sentencing jury and analyzing new procedures required by *Blakely*); *United States v. Landgarten*, 2004 U.S. Dist. LEXIS 13172 (ED NY 7-15-04) (ordering sentencing jury); *United States v. Shamblin*,

In Mr. Flarida's case, as set forth in the statement of the case, supra, his sentence was unquestionably increased from 6 months incarceration to 121 months incarceration based on facts not charged in indictment, not submitted to a jury, not proven beyond a reasonable doubt, with no stipulation as to the facts and with no stipulation to judicial fact-finding.

Mr. Flarida vigorously contested each and every one of the proposed enhancements to his sentence. While Mr. Flarida's objections to enhancement were overruled, the evidence supporting the enhancements was *anything but* 'overwhelming'. This is apparent from the substance of the record as well as from the extensive sentencing proceeding, the filed objections, the counter objections and the responses to the objections to the Presentence Report.

While Mr. Flarida did not raise a challenge to his sentence under *Apprendi* to the court of appeals, at the time of the appeal, case law foreclosed a challenge. It was only after his appeal was decided that this Court handed down its

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2004 U.S. Dist. LEXIS 12288 (SD WV 6-30-04) (same -- finding guideline sentencing range of 6-12 months under *Blakely* where guidelines previously mandated life incarceration); *United States v. Gonzalez*, 2004 U.S. Dist. LEXIS 11760 (SD NY 6-28-04) (indicating *Blakely* applies to Federal Sentencing Guidelines); *United States v. Marseille*, 2004 U.S. App. LEXIS 15058 (11th Cir. 7-21-04) (considering *Blakely* application to various guideline enhancements); *United States v. Zompa*, 2004 U.S. Dist. LEXIS 14335 (D ME 7-26-04) (finding unconstitutional portions of Guidelines can be "severed" and applying *Blakely* to guideline sentencing range). But see *United States v. Pineiro*, 2004 U.S. App. LEXIS 14259 (5th Cir. 7-12-04) (holding that *Blakely* does not apply to Guidelines); *United States v. Hammoud*, 2004 U.S. App. LEXIS 15898 (4th Cir. 8-2-04) (same)

Blakely decision where the error in Mr. Flarida's sentence became "clear".

This Court held in *United States v. Cotton*, 122 S. Ct. 1781; 152 L. Ed. 2d 860; 2002 U.S. LEXIS 3565 (5-20-02), that under the circumstances of Mr. Flarida's case, the Court can notice an *Apprendi* violation under the plain error standard of Fed. R. Crim. P. 52(b). Mr. Flarida respectfully submits that the Court should notice his *Blakely* issue as plain error also.

Based on the foregoing, the decision by the Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States*, 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

2.) THIS COURT SHOULD GRANT MR. FLARIDA'S PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO THE SCOPE OF THE MAIL AND WIRE FRAUD STATUTES.

2A.) 18 U.S.C. §§ 1341 And 1343 Are Unconstitutionally Vague As Applied To Mr. Flarida's Case.

There are two types of fraud criminalized by the mail and wire fraud statutes. First, there is fraud by false statement. Second, there is fraud by scheme. 18 U.S.C. § 1341 and 18 U.S.C. § 1343. Both types of fraud require the government to prove a specific, material false statement, or a specific, material omission. In *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) the Court stated "we hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Id.* at 25 (emphasis added). A prerequisite to a material falsehood, is a falsehood; that is, either a misrepresentation or the concealment of a material fact. *Id.* 527 U.S. at 22 ("the well settled meaning of 'fraud' required a misrepresentation or concealment of material fact.")

The Seventh Circuit recognized that after *Neder*, a scheme to defraud requires a false statement or the concealment of a material fact. In *United States v. Gee*, 226 F.3d 885 (7th Cir. 2000), defendants were convicted of mail and wire fraud. Prior to trial, defendants moved to dismiss the indictment for failing "to allege any false or misleading statements." However, "[under the law at that time, the district court correctly ruled that a material falsehood was not an essential element of the wire or mail fraud statutes." *Id.* at 891. On appeal, the Seventh Circuit recognized that after

Neder, "a scheme to defraud" under the wire and mail fraud statutes must include the element of a material falsehood." *Gee*, 226 F.3d at 891. Because the government failed to allege or prove a material false statement at trial, the Seventh Circuit reversed defendants' convictions and remanded with instructions for the district court to enter a judgment of acquittal. *Id.* 226 F.3d at 892.

In the present case, at the jury instruction conference, defendants repeatedly argued that a material false statement was an element of a "scheme to defraud" for mail and wire fraud. (Tr. 9-28-00, pages 211-257) defendants specifically requested that an interrogatory be submitted to the jury requesting the jurors identify the specific material false statement on which they unanimously agree." (ER 193) This request was denied. (Tr. 9-28-00, page 212)

Thus, over defense objection, the jury was instructed that a defendant's actions can constitute a scheme to defraud even if there are no specific false statements involved.

On appeal, the court of appeals affirmed on the basis that Ninth Circuit precedent in *United States v. Woods*, 335 F.3d 993; 2003 U.S. App. LEXIS 14054 (9th Cir. 7-14-03) (Appendix D) mandated that no specific false statement is necessary to support a conviction for mail fraud and wire fraud. More specifically, the court of appeals held,

> ... the materiality element of the mail and wire fraud offenses does not require proof of a specific false statement or a specific omission, and that the fraudulent nature of a scheme to defraud is measured by non-technical standards

United States v. Flarida, 2004 U.S. App. LEXIS 10490 **2 (9th Cir. 5-26-04) (Appendix A)

The court of appeals decision is, therefore, in direct conflict with the law of the Seventh Circuit. *United States v. Gee*, 226 F.3d 885 (7th Cir. 2000).

Moreover, the error unquestionably prejudiced Mr. Flarida because it is impossible to say that he was convicted for anything but specific, lawful acts.

To the extent that he may well stand convicted for 'committing' specific, lawful acts, his conviction runs afoul of the Fifth Amendment. This is because the Due Process Clause of the Fifth Amendment requires the legislature to specify the elements of criminal offenses. "There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629, 71 L. Ed. 443, 47 S. Ct. 200 (1926). A criminal statute is void for vagueness if it fails to give notice of the conduct prohibited or fails to channel the discretion of the prosecution:

> As generally stated, the void-for-vagueness doctrine requires [1] that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender v. Lawson, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983); See also *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982); *Smith v. Goguen*, 415 U.S. 566, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972). "[A] court must first determine whether the statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited and then consider whether the law provides explicit standards for those who apply it." *Chatin v. Coombe*, 186 F.3d 82, 87 (2nd Cir. 1999) (quoting *United States v. Strauss*, 999 F.2d 692, 697 (2nd Cir. 1993)). In short, the statute must give notice of the forbidden conduct and set boundaries to prosecutorial discretion. *Id*

This principle has been applied to the mail fraud and wire fraud statutes to find them unconstitutionally vague as applied. *United States v. Handakas*, 286 F.3d 92; 2002 U.S. App. LEXIS 4604 (2nd Cir. 2002) (collecting authorities)

In Mr. Flarida's case, as set forth above, it is impossible to say that he was not convicted for a specific, *lawful* acts. This is precisely the evil condemned by this Court under the vagueness doctrine.

While the court of appeals did not consider a void for vagueness challenge to Mr. Flarida's conviction, the facts were squarely before that court and the issue could have and should have been decided by that court.

The outcome of litigation should not depend on the location of the court in which it occurs. These facts strongly militate for grant of certiorari. See Supreme Court Rule 10(a). *Montana v. Hall*, 481 U.S. 400, 406, 95 L.Ed.2d 354, 107 S.Ct. 1825 (1987); *United States v. Mendoza*, 464 U.S. 154, 78 L.Ed.2d 379, 104 S.Ct. 568 (198); *Braxton v. United States*, 500 U.S. 344, 114 L.Ed.2d 385, 111 S.Ct. 1854 (1991); *Stinson v. United States*, 508 U.S. ___, ___, and [n.], 123 L.Ed.2d 598, 605 and [n. 2], 113 S.Ct. 1913 (1993); *Bailey v. United States*, 516 U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Ninth Circuit in Mr. Flarida's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Robert Flarida respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[8] to the court of appeals for reconsideration in light of *Blakely v. Washington*, 124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573 (6-24-04) and *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

ROBERT FLARIDA
09192-112
3705 West Farm Road
Lompoc, CA 93436

Date: 8-24-04 .

[8] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).

No.

Supreme Court of the United States

ROBERT FLARIDA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

COMES NOW PETITIONER Robert Flarida and submits the attached appendix pursuant to Supreme Court Rules.

Date: 8-24-04

ROBERT FLARIDA
09192-112
3705 West Farm Road
Lompoc, CA 93436

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT DATED 5-26-04

97 Fed. Appx. 794, *; 2004 U.S. App. LEXIS 10490, **

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ROBERT JAMES FLARIDA, aka Fred Stone; aka Butch Flarida, Defendant - Appellant.

No. 02-50065

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

97 Fed. Appx. 794; 2004 U.S. App. LEXIS 10490

March 29, 2004, Argued and Submitted, Pasadena, California

May 26, 2004, Filed

NOTICE: [**1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CR-98-00152-GLT-01. Gary L. Taylor, District Judge, Presiding. United States v. Woods, 335 F.3d 993, 2003 U.S. App. LEXIS 14054 (9th Cir. Cal., 2003)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: A jury convicted defendant of mail fraud, wire fraud, and money laundering under 18 U.S.C.S. §§ 1341, 1343, and 1956(a)(1)(A)(i), arising out of his role in a telemarketing scheme that targeted elderly individuals. The United States District Court for the Central District of California sentenced him to 121 months in prison. Defendant appealed.

OVERVIEW: Defendant argued that the district court erred by instructing the jury that no specific statements or omissions were necessary to support a finding of a "scheme to defraud" for purposes of mail and wire fraud. This argument was foreclosed by the appellate court's precedent, as was defendant's arguments that the district court erred by taking judicial notice of a Federal Trade Commission regulation--the Telemarketing Sales Rule at 16 C.F.R. §§

310.3-310.4--to support wire and mail fraud charges. Defendant also contended that the district court erred by denying his Fed. R. Crim. P. 33 motion for a new trial, or, in the alternative, an evidentiary hearing, in light of the United States' alleged failure to produce evidence in violation of the Jencks Act, 18 U.S.C.S. § 3500, Fed. R. Crim. P. 16, and Brady. Defendant's lack of diligence in obtaining affidavits from government witnesses alone defeated his motion for a new trial. In addition, he did not show how information in the alleged audiotapes of the witnesses' interviews would have affected the outcome of his trial. The government's alleged Jencks Act nondisclosure, if it occurred, was harmless, and no Brady violation occurred.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Elana Shavit Artson, Esq., USLA - OFFICE OF THE U.S. ATTORNEY, Los Angeles, CA.

For ROBERT JAMES FLARIDA, aka Fred Stone; aka Butch Flarida, Defendant - Appellant: Eric T. Smith, Esq., Orange, CA.

JUDGES: Before: PREGERSON, BEEZER, and TALLMAN, Circuit Judges.

OPINION: [*795] MEMORANDUM *

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

Robert James Flarida appeals his jury conviction and 121-month sentence for mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and [**2] money laundering, 18 U.S.C. § 1956(a)(1)(A)(i), arising out of his role in a telemarketing scheme that targeted elderly individuals. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Flarida first argues that the district court erred by instructing the jury that no specific statements or omissions were necessary to support a finding of a "scheme to defraud."

In a published opinion concerning Flarida's co-defendants, we rejected an identical argument. See *United States v. Woods*, 335 F.3d 993, 998-1000 (9th Cir. 2003) (holding that the materiality element of the mail and wire fraud offenses does not require proof of a specific false statement or a specific omission, and that the fraudulent nature of a scheme to defraud is measured by non-technical standards). Following Woods, we hold that the district court did not err in instructing the jury.

Next, Flarida alleges that the district court erred by taking judicial notice of a Federal Trade Commission regulation--the Telemarketing Sales Rule at 16 C.F.R. §§ 310.3-310.4--to support wire and mail fraud charges. Again, this argument [**3] is precluded by *Woods*. See 335 [*796] F.3d at 1001. We affirm the district court's decision to take judicial notice of this regulation.

Finally, Flarida contends that the district court erred by denying his motion pursuant to Federal Rule of Criminal Procedure 33 for a new trial, or, in the alternative, an evidentiary hearing, in light of the government's alleged failure to produce evidence in violation of the Jencks Act, 18 U.S.C. § 3500, Federal Rule of Criminal Procedure 16, and *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). We review a district court's denial of a motion for a new trial for abuse of discretion, and review factual findings for clear error. *United States v. Endicott*, 869 F.2d 452, 454 (9th Cir. 1989).

Under Rule 33, a district court may vacate any judgment and grant a new trial if "the interest of justice so requires." Fed. R. Crim. Proc. 33(a). A new trial may be granted based on newly discovered evidence, Fed. R. Crim. Proc. 33(b)(1) [**4] , and Florida contends that several newly discovered witness statements and documents warrant this result. To obtain a new trial on this ground, he must show that: (1) this evidence is newly discovered; (2) his failure to discover the evidence was not due to a lack of diligence; (3) the evidence is material to the issue at trial; (4) the evidence

is neither cumulative nor impeaching; and (5) a new trial would probably result in an acquittal. *United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003).

Florida contends that his later interviews of several witnesses revealed that their government interviews had been audio-recorded and that they had turned over certain documents that Florida never received. The government disclosed its list of witnesses prior to trial, but Florida has not explained why he could not have obtained affidavits from these witnesses earlier. See *United States v. Sarno*, 73 F.3d 1470, 1507 (9th Cir. 1995). This failure to exercise diligence alone defeats Florida's motion for a new trial. *Id.* In addition, he has not shown how information in the alleged audiotapes of the witnesses' interviews would have affected the outcome [**5] of his trial. The district court found that the evidence, if it existed, would be merely cumulative or impeaching, and this finding is not clearly erroneous.

Under Rule 16,

> the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

Fed. R. Crim. Pro. 16(a)(1)(A) (emphasis added). Florida has not indicated any statement made by the defendant--i.e., made by him--that the Government failed to disclose. Additionally, a Rule 16 violation cannot be premised on the government's failure to disclose statements made by its witnesses because the Rule "expressly states that it does not authorize discovery of inspection of statements made by prospective government witnesses." *United States v. Alvarez*, 358 F.3d 1194, 1207 n.8 (9th Cir. 2004).

The Jencks Act requires the government to turn over any prior statements made by its testifying witnesses. 18 U.S.C. § 3500(b). Without [**6] resolving the question

whether such statements ever existed, the district court found that Florida failed to make any showing that such evidence "would have had any effect" upon the conviction, "nor has [Florida] shown a new trial including the new evidence would likely produce a different result." Thus, the district court found that the government's [*797] alleged nondisclosure, if it even occurred, was harmless.

Harmless error analysis properly applies to alleged Jencks Act violations, see *United States v Riley*, 189 F.3d 802, 805(9th Cir. 1999), and we agree with the district court that the Jencks Act violation that Florida alleges, if it even occurred, would have been harmless. Florida fails to point to any evidence gathered from the post-trial interviews that suggests that the tape recordings, or transcript thereof, would be potentially useful to the defense. In fact, Florida's post-trial interviews indicate that this evidence, if it exists, is merely duplicative of other evidence in possession of defense counsel. Similar to *United States v. Sterling* 742 F.2d 521, 525 (9th Cir. 1984), Florida possessed at trial the same information that the undisclosed [**7] evidence provided. Thus, the record demonstrates that Florida suffered no significant injury and that the district court did not abuse its discretion by finding that any error was harmless.

Florida also argues that a new trial is warranted because the government violated Brady v. Maryland by failing to disclose allegedly exculpatory evidence it had received from witnesses, including a questionnaire, a refund request, a napkin with hand-written notes, and other notes regarding witness interviews. To establish a *Brady* violation, Florida must prove that: (1) the evidence at issue would be favorable to him in that it is exculpatory or impeaching; (2) the government withheld the evidence, either willfully or inadvertently; and (3) he was prejudiced as a result. *Strickler v. Greene*, 527 U.S. 263, 281-82, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999). We review de novo the district court's denial of a motion for a new trial based on alleged Brady violations.

United States v. Danielson, 325 F.3d 1054, 1074 (9th Cir. 2003).

The government maintains that all relevant and discoverable material was disclosed to the defense and that no exculpatory evidence was derived [**8] from its investigations. Flarida has not proven the existence of such evidence, let alone any attempt by the government to suppress it. Even if it did exist, there is nothing to suggest that this evidence was in fact exculpatory such that a different result would have been reached at trial had it been presented to the jury. Therefore, the district court did not err by concluding that no Brady violation had occurred.

AFFIRMED.

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APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ENTERED 1-23-02

Date: January 18, 2002
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

v.

Defendant ROBERT FLARIDA
Akas: FLARIDA, Butch, SHARKEY,
Robert, STONE, Fred
Docket No. SACR 98-152 (B)-GLT
Social Security No. XXX-XX-8439
Residence
5028E, Glenview Ave.
Address Anaheim Hills, CA 92807
Mailing Address:
Santa Ana City Jail
62 Civic Center Plaza
Santa Ana, CA 92701

JUDGEMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person, on this date : January 18, 2002

COUNSEL : XX WITH COUNSEL Jon Rivers, Retd.

PLEA : XX GUILTY, and the Court being satisfied that there is a factual basis for the plea
_____NOLO CONTENDERE _____NOT GUILTY

FINDING: There being a verdict OF GUILTY, defendant has been convicted as charged of the offense(s) of: Mail Fraud, Aiding and Abetting, and Causing an Act to be done as charged in Counts 1-4, 6, 8, 10, 43 and 46-48 in violation of 18 USC 1341, 2; Wire Fraud, Aiding and Abetting, and Causing an Act to Be Done as charged in Counts 11-16, 18, 20, 22, 49, and 52-54, in violation of 18 USC 1343, 2; and

Money Laundering, Aiding and Abetting, and Causing an Act to be Done as charged in Counts 23-33, in violation of 18 USC 1956(a) (1) (A) (1) (i), 2.

JUDGEMENT AND PROBATION/COMMITMENT ORDER:

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that:

It is ordered that the defendant shall pay to the United States a special assessment of $3,250, which is due immediately.

It is further ordered that the defendant shall pay restitution in the total amount of $1,296,527.69, pursuant to 18 USC 3663A. The amount of restitution ordered shall be paid as set forth on the list attached to this judgment. If the defendant makes a partial payment, each payee shall receive approximately proportional payment unless another priority order or percentage payment is specified in this judgment

Restitution shall be due during the period of imprisonment, as directed by the Court or the United States Attorney, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If any amount of the restitution remains unpaid after release from custody, nominal monthly payments of at least $750 shall be made during the period of supervised release. These payments shall begin 30 days after the commencement of supervision. Nominal restitution payments are ordered as the court finds that the defendant's economic circumstances do not allow for either immediate or future payment of the amount ordered.

Pursuant to 18 USC 3612(f) (3)(A), interest on the restitution ordered is waived because the defendant does not have the ability to pay interest. Payments may be subject to penalties for default and delinquency pursuant to 18 USC 3612 (g).

The defendant and Doreen Woods, Jason Garcia, Rachel Bennett, and William Meloni, his convicted co-

participants, will be held jointly and severally liable for the amount of restitution.

If any amount of the restitution ordered remains unpaid after the termination oJ supervision, the balance shall be paid as directed by the United States Attorney's Office.

Pursuant to Section 5E1.2(e) of the Guidelines, all fines are waived as it is found that the defendant does not have the ability to pay a line in addition to restitution.

Until restitution has been paid in full, the defendant shall notify the United States Attorney General of any change in his mailing or residence address no later than thirty (30) days after the change occurs.

The defendant shall notify the Court, through the Probation Office, and the United States Attorney General of any material change in his economic circumstances that might affect his ability to pay restitution.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Robert Flarida, is hereby committed on Counts 1 through 4, 6, 8, 10-16, 18, 20, 22-33, 43, 46-49, and 52-54 of the 54-Count Amended First Superseding Indictment, to the custody of the Bureau of Prisons to be imprisoned for a term of 121 months. This term consists of 60 months on each of Counts 1-4, 6, 8, 10-16, 18, 20, 22, 43, 46-48, 49, 52-54 of the Amended First Superseding Indictment, and 121 months on each of Counts 23-33 of the Amended First Superseding Indictment, all terms to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. This harm consists of three years on all counts of conviction, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the U.S. Probation office and General Order 318;
2. During the period of community supervision, the defendant shall pay the special assessment and restitution

in accordance with this judgment's order pertaining to such payment;

3. The defendant shall notify the Court, through the Probation Office, of any material change in his economic circumstances that might affect his ability to pay restitution or special assessments;
4. As directed by the Probation Officer, the defendant shall provide to the Probation Officer a signed release authorizing credit report inquiries, federal and state income tax returns and an accurate financial statement with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant shall not apply for any loan or open any line of credit without prior written approval of the Probation Officer;
5. The defendant shall not transfer, sell, give away or otherwise convey any asset with a fair market value in excess of $100 without written approval of the Probation Officer until restitution has been paid in full;
6. The defendant shall not obtain or possess any driver's license, Social Security number, birth certificate, passport or any other form of identification in any name, other than the defendant's true legal name, without the prior written approval of the Probation Officer; further, the defendant shall not use, for any purpose or in any manner, any name other than his true legal name;
7. The defendant shall maintain a single checking account in his name. All income, monetary gains or other pecuniary proceeds shall be deposited into this account, which shall be used for pays/ant of all personal expenses. All other bank accounts shall be disclosed to the Probation Officer; and
8. The defendant shall not engage, as whole or partial owner, employee or otherwise, in any business involving loan programs, telemarketing activities, investment programs or any other business involving the solicitation of funds or cold-calls to customers without the express written approval of the Probation Officer prior to

engagement in such employment. Further, the defendant shall provide the Probation Officer with access to any and all business records, client lists and other records pertaining to the operation of any business owned, in whole or in part, by the defendant, as directed by the Probation Officer.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse. However, the defendant shall abstain from using illicit drugs or alcohol and abusing prescription medications during the period of supervision.

The Court recommends housing in the Southern California area so that the defendant may visit with his minor child, wife and family.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed, the Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

Signed by: District Judge Gary L. Taylor Dated 1/22/2002

It is ordered that the Clerk deliver a certified copy of this Judgement and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Sherry L. Carter, Clerk

Dated / Filed 1/23/02 By Lisa Bredahl, Deputy Clerk

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). Tile

defendant shall comply with the additional conditions on the attached page(s) pursuant to General Orders 318 and 01-05.

Statutory Provisions Pertaining to Payment and Collection of Financial Sanctions

The defendant shall pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment pursuant to 18 U.S.C. §3612(0(1). Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed prior to April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant shall pay the balance as directed by the United States Attorney's Office. 18 U.S.C, §3613.

The defendant shall notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. §3612(b)(1)(F).

The defendant shall notify the Court through the Probation Office, and notify the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. §3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution-pursuant to 18 U.S.C. §3664(k). See also 18 U.S.C. §3572(d)(3) and for probation 18 U.S.C. §3563(a)(7).

Payments shall be applied in the following order:

1. Special assessments pursuant to 18 U.S.C. §3013;
2. Restitution, in this sequence:
   Private victims (individual and corporate),
   Providers of compensation to private victims,
   The United States as victim;
3. Fine;
4. Community restitution, pursuant to 18 U.S.C. §3663(c); and
5. Other penalties and costs.

Special Conditions for Probation and Supervised Release

As directed by the Probation Officer, the defendant shall provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant shall not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant shall maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds shall be deposited into this account, which shall be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, shall be disclosed to the Probation Officer upon request.

The defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised released pursuant to this judgement:

1. The defendant shall not commit another Federal, state or local crime.

2. The defendant shall not leave the judicial district without the permission of the Court or probation officer.

3. The defendant shah report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

4. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

5. The defendant shall support his or her dependents and meet other family responsibilities.

6. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons.

7. The defendant shall notify the probation officer within 72 hours of any change m residence or employment.

8. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed physician.

9. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

10. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

11. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

12. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer.

13. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

14. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15. The defendant shall not possess a firearm or other dangerous weapon.

16. The defendant shall, upon release from any period of custody, report to the probation officer within 72 hours.

Those conditions are in addition to any other conditions imposed by this Judgment.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____ at _____ in institution designated by the Bureau of Prisons, with a certified copy of Judgement and Commitment.

Dated UNITED STATESMARSHAL

By _____

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, arid in my legal custody.

CLERK, U.S. DISTRICT COURT

Dated :_____ By: Lisa Bredahl, Deputy Clerk_____

APPENDIX C

USDC ORDER DENYING NEW TRIAL
DATED 7-6-01

Date: July 6, 2001
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
ROBERT FLARIDA,
DOREEN WOODS,
AND JASON GARCIA,
Defendants.

Case No. SA CR 98-152-GLT

ORDER DENYING DEFENDNT'S MOTION FOR A NEW TRIAL

The Court denies Defendant's motion.

I. BACKGROUND

On October 5, 2000, Robert Flarida, Doreen Woods, and Jason Garcia were found guilty of mail fraud, wire fraud, and money laundering after a jury trial. Defendants currently await sentencing. At trial, several witnesses testified for the prosecution. When Defense counsel requested any statements relating to the testimony of the witnesses under Rule 16, the prosecution provided the defense with questionnaires filled out by each witness, along with the investigators' notes and other reports of the interviews. After trial, Defendant Flarida conducted an investigation that developed evidence that three of the interviews had been taped. No transcripts or copies were provided to the defense. Motion, at 6. Defendant Flarida also'-co, tends the government took additional documents and information from the witnesses, which it did not disclose to Defense counsel. Id. at 7.

Defendant Flarida, joined by Defendants Doreen Woods and Jason Garcia, moves for new trial, or, in the alternative, for an evidentiary hearing. Defendant alleges the

government withheld evidence in violation of the Jencks Act, Brady v. Maryland, and Federal Rule 16.

2. DISCUSSION.

A motion for a new trial is left to the discretion of the court, which may grant such a motion "in the interest of justice." Fed. R. Crim. Proc. 33. When new evidence is discovered, for a defendant to prevail, he must show (1) the evidence was discovered after trial; (2) the failure to learn of the evidence earlier was not due to lack of diligence; (3) the evidence is material to the issues tried, and not merely cumulative or impeaching; and (4) a new trial including the new evidence would likely produce a different result. See, e.g., *United States v. Sarno*, 73 F.2d 1470 (9th Cir. 1995); *United States v. Mett*, 65 F.3d 1531 (9th Cir. 1995).

Factors to be considered are whether the information contained in the statement was more than trivially or inconsequentially inconsistent with the testimony or other statements of the witness; whether the defense already had access to substantial information about the witness; and whether the new information could have materially added to impeachment of the witness. *United States v. Johnson*, 521 F.2d 1318, 1320 (9th Cir. 1975).

Under the Jencks Act, 18 U.S.C. § 3500 the government must turn over pretrial statements made by prosecution witnesses related to the subject matter of their trial testimony. "There are no exceptions to the Jencks rule that all statements relevant to the subject matter of the witness' testimony must be produced..." *United States v. Bibbero*, 749 F.2d 581, 585 (9th Cir. 1984), cert. denied, 471 U.S. 1103 (1985). "The statement need relate only generally to the events and activities testified to by the witness to come within its sweep." Id. This rule is applicable to criminal trials under Federal Rule of Criminal Procedure 26.2(a).

The Jencks Act provides that, after a government witness has testified on direct examination, "the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness

in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b) .

Additionally, Defendant argues the government violated Federal Rule of Criminal Procedure 16(a) (1) (D), and violated Defendant's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Under FRCP 16(a) (1) (D), the government must permit the defendant, upon request. "to inspect and copy... any results or reports of... scientific tests or experiments... which are material to the preparation of the defense." In *Brady*, the Supreme Court held "the suppression by the prosecutor of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment." *Brady*, 373 U.S. at 86.

For *Brady* purposes, constitutional error results from suppression of exculpatory evidence by the government only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceedings would have been different." *Kiles v. Whitney*, 514 U.S. 419, 419 (1995).

A. Witness Tapes.

Two witnesses, stated in defense investigation declarations that United States Attorney, David Lavine, and others took part in taping their witness statements. Motion at 9, Exh. 4a at 56:5-9, 56:13-25; Reply, Exh. 1 at 3. Because the government neither turned over a summary of the interviews, nor provided any transcript of the tapes, the Defendant contends he was denied effective cross-examination of the witnesses. Motion, at 11. The government contends it never taped these witness interviews and disclosed all relevant information to Defendant, which Defense counsel had adequate opportunity to peruse. Lavine Decl. at ¶ 4; Vanderpool Decl. at ¶ 10; Watson Decl. at ¶ 10. The government asserts the elderly witnesses may have been confused because government representatives brought a hand held tape recorder with them to interviews in order to play

the verification tapes made by defendants during the course of their telemarketing activities. Opp. at 6.

Regardless of whether the witness statements were taped, Defendant has not shown the evidence is not merely cumulative or impeaching. Nor has Defendant shown a new trial including the new evidence would likely produce a different result. *Sarno*, 73 F.3d at 1507. Defendant merely states "without an evidentiary hearing, it cannot be determined whether the undisclosed tapes contained only cumulative evidence or that their exclusion does not create a 'reasonable probability' of a different result at trial." Motion, at 13. This is not sufficient.

B. Disclosure of Documents.

Defendant points to several pieces of evidence he asserts would have changed the outcome of the trial: documents allegedly provided by Meda Fehrman, a refund request allegedly mailed by Millie Davis, a napkin containing jotted-down notes allegedly provided by Millie Davis, notes provided by Thelma Scherer, a questionnaire allegedly completed by Mary Fogg, notes provided by Louise Lynch, and written memorializations allegedly made of interviews with Robert Walters and Eric Bennett[9]. The government contends all information it had available was timely disclosed to the Defense. Opp. at 7-8.

Even if these items qualified as non-cumulative, non-impeaching newly discovered evidence, the Defendant has not made any showing that their introduction at trial would have had any effect upon the outcome. *Sarno*, 73 F.3d at 1507.

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[9] Defendant also points to an inconsistency in Susan Watsoh's declaration and trial testimony. Reply, at 3. The inconsistency has to do with whether she contacted MTI customers before interviewing them. Id. at 3-4.

C. No evidentiary hearing required.

An evidentiary hearing is not required simply to investigate evidence not disclosed earlier, or to do discovery on whether undisclosed evidence is cumulative or creates a probability of a different result. A higher showing by defendant is required. Defendant's conviction was based on strong evidence, corroborated from many resources. The defendant's present showing does not undermine confidence in the outcome of this trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Even if plaintiff's assertions of new evidence are true, the evidence is cumulative or impeaching, and there is no reasonable probability the result would have been different.

The motion for a new trial and request for an evidentiary hearing are DENIED.

DATED: July 5, 2001

Gary L. Taylor

United States District Judge

APPENDIX D

UNITED STATES V. WOODS
335 F.3D 993; 2003 U.S. APP. LEXIS 14054
(9th CIR. 7-14-03)

335 F.3d 993, *; 2003 U.S. App. LEXIS 14054, **;
61 Fed. R. Evid. Serv. (Callaghan) 1695; 2003 Cal. Daily Op. Service 6146

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DOREEN WOODS, aka Joann Barnes, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON GARCIA, aka Michael Bennett, Defendant-Appellant.

No. 01-50539, No. 01-50618

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

335 F.3d 993; 2003 U.S. App. LEXIS 14054; 61 Fed. R. Evid. Serv. (Callaghan) 1695; 2003 Cal. Daily Op. Service 6146

May 12, 2003, Argued and Submitted, Pasadena, California
July 14, 2003, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Garcia v. United States, 157 L. Ed. 2d 444, 124 S. Ct. 591, 2003 U.S. LEXIS 8490 (U.S., 2003)

US Supreme Court certiorari denied by Woods v. United States, 157 L. Ed. 2d 444, 124 S. Ct. 586, 2003 U.S. LEXIS 8489 (U.S., 2003)

Related proceeding at United States v. Flarida, 2004 U.S. App. LEXIS 10490 (9th Cir. Cal., May 26, 2004)

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Central District of California. D.C. No. CR-98-00152-GLT. Gary L. Taylor, District Judge, Presiding.

DISPOSITION: Affirmed in part, vacated in part, and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants were convicted in the United States District Court for the Central District of California of mail fraud, wire fraud, and money laundering. They appealed their convictions for mail and wire fraud. One defendant also challenged sentencing enhancements that she received.

OVERVIEW: Defendants challenged their convictions on the ground that the district court erroneously instructed the jury that no specific false statement was required. The instant court, however, concluded that no specific false statement was required. The mail fraud statute included everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. Further, the jury was instructed as to the materiality requirement. The instant court also concluded that there was no constructive amendment of one defendant's indictment by shifting the theory of mail and wire fraud in the jury instructions from "false pretenses" to a "scheme to defraud," destroying his right to be tried only the charges presented in the indictment; the district court did not broaden the possible basis for conviction by instructing on a "scheme to defraud" theory. Finally, the enhancement under U.S. Sentencing Guidelines Manual § 3B1.1 was improper, because the record did not show that the relevant defendant managed or supervised at least one other participant; referring customers back to closers for reprepping was not managerial or supervisory.

OUTCOME: The convictions were affirmed, but the sentence at issue was vacated and that matter was remanded.

COUNSEL: Kenneth M. Miller (argued), Steward & Miller, Capistrano Beach, California, for defendant-appellant Doreen Woods.

Judith Rochlin, Law Offices of Judith Rochlin, Los Angeles, California, for defendant-appellant Jason Garcia.

Debra Yang, United States Attorney; Jacqueline Chooljian, Assistant United States Attorney, Chief, Criminal Division; and Elana Shavit Artson (argued), Assistant United States Attorney, Criminal Appeals Section, Los Angeles, California, for the plaintiff-appellee.

JUDGES: Before: A. Wallace Tashima, Marsha S. Berzon, and Richard R. Clifton, Circuit Judges. Opinion by Judge Clifton.

OPINIONBY: Richard R. Clifton

OPINION:

[*995] CLIFTON, Circuit Judge:

Doreen Woods and Jason Garcia were convicted of mail fraud, wire fraud, and money laundering based on their involvement in a telemarketing scheme. Woods and Garcia appeal their convictions for mail and wire fraud on the ground that the district court erroneously instructed the jury that no specific false statement was required. Woods also contends that the district [**2] court erred by taking judicial notice of a Federal Trade Commission ("FTC") telemarketing rule. Finally, Woods challenges sentencing enhancements she received for having been a manager or supervisor and for having violated a judicial order. We affirm the convictions but vacate Woods' sentence and remand for resentencing of Woods.

I. BACKGROUND

From 1995 to 1997, Woods and Garcia participated in a telemarketing scheme at a company in Orange County, California, known initially as Magazine Network and [*996] later as Magtopia, Inc. ("MTI"). The scheme solicited over one million dollars from more than 1,900 customers, many of them elderly. An "opener" would make initial contact with potential customers, telling them that they had been selected to win one of four awards: (1) a cashier's check for $ 2,500, (2) a television or $ 3,500, (3) a designer diamond watch, or (4) a new car or $ 15,000. MTI bought the watches for $ 28 each. If asked how much the watch was worth, openers were instructed to say that they couldn't tell because "the price of diamonds varied from coast to coast." However, they were told to describe the watch in ways that made it sound valuable. For example, it was [**3] sometimes described as being like the watches given away on game shows "The Price is Right" and "Wheel of Fortune."

The openers told the customers how much money to send, purportedly representing the cost of receiving the award. The amount requested ranged from $ 299 to $ 866. The openers did not say that the money was actually for the

purchase of magazines. If a customer expressed interest, the opener would pass the call to a "closer," who was described inaccurately to the customer as a "manager." The job of a closer was to convince customers to send in their checks. Closers told customers to make their checks payable to MTI, to write "magazines" on the memo line of the check, and to send the checks by over-night delivery. The closers told the customers neither the odds of winning any prize nor that MTI was selling them magazines.

After MTI received a customer's check, a closer would make a "preparation call" to the customer informing him that his check had been received and that the money he had sent was for magazines, making the award a free bonus. The closers also told the customers to expect a "verification call" from the shipping department, and instructed the customers to [**4] tell the verifiers that they understood everything. Customers were told not to ask any questions during the verification calls. During the verification calls, customers were told that the odds of receiving the car, television, or $ 2,500 check were each 1 in 4,000, and that everyone else would receive a watch. They were told that they were "absolutely guaranteed" to receive one of those four awards. The customers were also told that they would receive an award certificate and a form for ordering magazines.

The purpose of the verification call was to get the customer on tape as agreeing to everything. If a customer asked questions or raised objections during the verification call, the verifiers would rewind the tape and have the closer call back to "reprep" the customer in an attempt to close the deal. If a customer continued to ask questions or object during a second verification call, the verifier would erase the tape and write "verbal verification" on the order.

Woods was the corporate secretary for MTI and did such things as maintain customer files, order magazines, handle incoming checks, and verify the funds in customers' bank accounts. She also worked as an opener and as a [**5]

verifier, using the name Joann Barnes. Garcia, using the name Michael Bennett, worked as a closer for MTI. Co-defendant Robert Flarida was the owner, president, and CEO of MTI. He held staff meetings, instructed salespeople on how to conduct calls, and monitored calls. He also served as a verifier and salesperson and handled customer complaints.

MTI was searched by federal agents in May 1997. Shortly thereafter, Woods and Flarida (along with Rachel Bennett) n1 set up a virtually identical operation known as North Star Publications ("North Star"). [*997] Woods, using the name Marie Evans, worked as an opener, closer, and verifier for North Star. North Star solicited approximately $ 130,000 from more than 350 customers. It was searched by federal agents and shut down in February 1998.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Bennett was charged in the original indictment and pled guilty on September 20, 1999.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

At trial, seven elderly victims testified for the government. They had each sent in between $ 316 and $ 866 to MTI. They testified that they would [**6] not have sent money to MTI had they known it was for the purchase of magazines. Some of the victims had complained but to no avail. A postal inspector testified that he had determined that 68% of MTI's full-paying customers neither returned the award certificate nor received a prize, and that 48% of the full-paying customers neither returned the award certificate, received a prize, nor received a magazine. Some of the full-paying customers who did not return the award certificate or receive a prize did receive magazines selected by MTI. Seventy percent of North Star's customers did not return the award certificate; some of them received nothing while others received magazines selected by North Star. Most of the customers who did return the award certificate received the magazines they had selected.

Woods and Garcia were convicted of mail fraud under 18 U.S.C. § 1341, and of wire fraud under 18 U.S.C. § 1343.

Woods was also convicted of money laundering. n2 Woods was sentenced to 87 months of imprisonment and Garcia to 41 months of imprisonment. Woods and Garcia timely appealed.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Flarida was convicted of mail fraud and money laundering.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

II. DISCUSSION

A. Jury Instructions

1. No Specific False Statement Was Required.

Defendants Woods and Garcia challenge their convictions for mail and wire fraud, contending that the court's jury instructions violated *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999), by not requiring a specific false statement. We review de novo whether the jury instructions omitted or misstated an element of the charged offense. *United States v. Stapleton*, 293 F.3d 1111, 1114 (9th Cir. 2002). We review the formulation of the instructions for abuse of discretion, considering the instructions as a whole and in context. Id.

In Instructions 5 and 7, the court told the jury that, for a defendant to be convicted of mail or wire fraud, the government must prove four elements: (1) that the defendant knowingly devised or knowingly participated in a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations or promises; (2) that the statements made or the facts omitted as part of the scheme were material; (3) that the defendant acted with the [**8] intent to defraud; and (4) that in advancing or furthering or carrying out the scheme, the defendant used the mails/wires or caused the mails/wires to be used.

The court charged the jury in Instruction 10 that:

In determining whether a scheme to defraud exists, you are entitled to consider not only the defendant's words and statements, but also the [*998] circumstances in which

they are used as a whole. A defendant's actions can constitute a scheme to defraud even if there are no specific false statements involved. The deception need not be premised upon words or statements standing alone. The arrangement of the words or the circumstances in which they are used may create an appearance which is false or deceptive, even if the words themselves fall short of this. Thus, even if statements as part of the scheme are not literally false, you may consider whether the statements taken as a whole were misleading and deceptive. Evidence beyond a reasonable doubt that a scheme was reasonably calculated to deceive is sufficient to establish a scheme to defraud.

Defendants contend that *Neder* required the government to prove a specific material false statement on which the jury [**9] unanimously agreed. We are not persuaded.

Before *Neder*, our caselaw was clear that "[a] defendant's activities can be a scheme or artifice to defraud whether or not any specific misrepresentations are involved." *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981) (citing *United States v. Bohonus*, 628 F.2d 1167 (9th Cir. 1980); *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967); and *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960)). In *Lustiger*, the defendant advertised property for sale with materials containing statements, photographs and maps, unaccompanied by true statements concerning the lack of available water, [which] could reasonably have led a person of average intelligence and experience to believe that all parcels offered for sale had reasonable access to a water supply." 386 F.2d at 136. The "same pattern of fraudulent deception" was followed with respect to the availability of power and telephone lines, road access, and the surrounding community. See id. at 137-38. We affirmed the defendant's conviction for mail fraud, holding that, [**10] "[w]hile the statements in the advertising materials may not have been literally false, taken as a whole they were fraudulently misleading and deceptive." Id. at 136. We explained that

"deceitful statements of half truths or the concealment of material facts is actual fraud violative of the mail fraud statute. . . . [T]he deception need not be premised upon verbalized words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance." Id. at 138 (internal citations omitted).

The key lesson from *Lustiger* was that, "[i]f a scheme is devised with the intent to defraud, and the mails are used in executing the scheme, the fact that there is no misrepresentation of a single existing fact is immaterial. It is only necessary to prove that it is a scheme reasonably calculated to deceive, and that the mail service of the United States was used and intended to be used in the execution of the scheme." Id. (emphasis added). Put another way, "[t]he fraudulent nature of the 'scheme or artifice to defraud' is measured by a non-technical standard. Thus, schemes are condemned which [**11] are contrary to public policy or which fail to measure up to the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *Bohomus*, 628 F.2d at 1171 (internal quotation marks and citations omitted). These holdings, which squarely foreclose Defendants' argument, were in no way undermined by *Neder*.

The pertinent issue in Neder was whether materiality was an element of a "scheme or artifice to defraud" under the federal mail and wire fraud statutes. 527 U.S. at 20. In that case, the district court did not include materiality as an element of the charged mail or wire fraud offenses in its jury instructions. See id. at 6. The Eleventh Circuit affirmed, holding that materiality was not an element of the mail or wire fraud statutes. See id. The Supreme Court started by determining that materiality [*999] was an element of fraud at common law. See id. at 22. It thus "presume[d] that Congress intended to incorporate materiality unless the statute otherwise dictates." Id. at 23 (internal quotation marks

and citation omitted). [**12] The Court rejected the government's attempts to rebut that presumption, ruling that the government had failed to show that the language of the fraud statutes was inconsistent with a materiality requirement. See id. at 25. Accordingly, the Court held that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." Id.

Seizing on this last quotation, Defendants argue that the government was required to prove a specific false statement on the ground that a "materiality of falsehood" requires a "falsehood." Defendants essentially contend that a "false-hood" must be either a specific false statement or a specific omission. We disagree. As noted above, Neder addressed the materiality of misrepresentation, not the specificity. With regard to specificity, *Neder* reiterated the holding in *Durland v. United States*, 161 U.S. 306, 40 L. Ed. 709, 16 S. Ct. 508 (1896), where the Supreme Court "construed the [mail fraud] statute to 'include[ ] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.' " Neder, 527 U.S. at 24 [**13] (quoting *Durland*, 161 U.S. at 313). The construction in *Durland*, with which our circuit's caselaw requiring no specific misrepresentation is fully consistent, was neither overruled nor undermined in Neder. Neder did not address *Durland* except to reject the argument, not relevant to our purposes, that Durland had interpreted the mail fraud statute as encompassing more than commonlaw fraud. See 527 U.S. at 24.

Post-*Neder* decisions confirm that *Lustiger* and its related cases remain good law. We expressly stated in a case decided after *Neder* that:

Under the mail fraud statute the government is not required to prove any particular false statement was made. See *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981). Rather, there are alternative routes to a mail fraud conviction, one being proof of a scheme or artifice to defraud, which may or may not involve any specific false

statements. Id.; see also *Lustiger v. United States*, 386 F.2d 132, 136 (9th Cir. 1967).

United States v. Munoz, 233 F.3d 1117, 1131 (9th Cir. 2000). Although *Munoz* [**14] did not mention Neder, its reinforcement of *Lustiger* and *Halbert* is, for the reasons stated above, not inconsistent with Neder. Additionally, *Lustiger* comports with the common-law meaning of fraud, which was to be incorporated into the mail and wire fraud statutes as much as possible. n3 See *United States v. Colton*, 231 F.3d 890, 898 (4th Cir. 2000); see also *Neder*, 527 U.S. at 21-23.

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n3 Contrary to Defendants' assertion, *United States v. Gee*, 226 F.3d 885 (7th Cir. 2000), does not support a different result. In that case, the Seventh Circuit reversed the mail and wire fraud convictions of defendants who had produced and sold equipment that allowed users to descramble and view premium cable channels without permission. See id. at 890-91. There was no allegation or proof that the defendants had made any material misrepresentation or concealment. See id. at 891-92. That fact distinguishes *Gee* from our case. The government here alleged, for instance, that Defendants had failed to tell customers that they were soliciting money for the purchase of magazines, had omitted or falsely insinuated the odds of winning awards before soliciting money, had falsely insinuated that the awards were all of substantial value, and had falsely claimed to have awarded a $ 2,500 prize check. Evidence at trial supported these allegations.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

[**15]

[*1000] Finally, the jury was instructed on the materiality requirement. It was told in Instructions 5 and 7 that an element of mail or wire fraud is that the statements made or the facts omitted as part of the scheme be material. Instruction 17 further informed the jury in pertinent part that:

All deceptive or misleading statements, false statements and half-truths, which are generally referred to as

statements, and concealed, omitted and nondisclosed facts, which we collectively refer to in these instructions as the facts, must be material to form the basis of mail or wire fraud charges. The statements or a statement or omitted fact is material if it is of a kind that would reasonably influence a person to part with money or property.

Considering the instructions as a whole, we conclude that the district court did not err. Instructions 5, 7, and 17 adequately informed the jury of *Neder's* materiality requirement. *Neder's* requirement of a "material falsehood" did not alter our preexisting caselaw to require a specific false statement.

2. There Was No Constructive Amendment of Garcia's Indictment.

Garcia asserts that, by instructing the jury that no specific [**16] false statement was required even though he was charged with having made false statements, the court improperly altered the crime charged. Essentially, Garcia contends that the court constructively amended the indictment by shifting the theory of mail and wire fraud in the jury instructions from "false pretenses" to a "scheme to defraud," n4 destroying his right to be tried only on the charges presented in the indictment. But that was not the case.

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n4 Mail or wire fraud can take the form of (1) a scheme or artifice to defraud, or (2) obtaining money or property by means of false or fraudulent pretenses, representations, or promises. *Halbert*, 640 F.2d at 1007. Each constitutes an independent and alternate basis for conviction. *United States v. Bonanno*, 852 F.2d 434, 441 (9th Cir. 1988).

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The indictment charged mail and wire fraud based on both theories:

> [D]efendants . . . knowingly devised, participated in, and executed a scheme to defraud elderly victims, and to [**17] obtain

> money and property from such victims by means of false and fraudulent pretenses, statements, representations, promises and innuendo, and the concealment and omission of material facts, in connection with the conduct of telemarketing.

As such, the court did not "broaden[ ] the possible basis for conviction" by instructing on a "scheme to defraud" theory. *United States v. Combs*, 762 F.2d 1343, 1346 (9th Cir. 1985). Because the "scheme to defraud" theory was charged in the indictment, this is not a situation in which the court "substantially amended the indictment through its instructions to the jury and thus destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." Id. (internal quotation marks and citation omitted).

B. FTC Telemarketing Sales Rule

The FTC has promulgated a Telemarketing Sales Rule (the "Rule"), which in pertinent part requires telemarketers engaged in prize promotions to disclose to customers before they pay for goods or services offered (1) that no purchase or payment is required to win the prize, and (2) the odds, and any conditions, of winning the prize. [**18] 16 C.F.R. § 310.3(a) (1)(iv), (v); 16 C.F.R. § 310.4(d)(4). The district court judicially noticed the Rule over Woods' objection. We review the court's [*1001] decision to take judicial notice for abuse of discretion. See *Madeja v. Olympic Packers*, LLC, 310 F.3d 628, 639 (9th Cir. 2002).

Far from abusing its discretion, the district court complied with federal law by judicially noticing the Rule. See 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed . . . ."). We have previously taken judicial notice of similar regulations. See *Mora v. Vasquez* (*In re Mora*), 199 F.3d 1024, 1028 n.7 (9th Cir. 1999) (judicially noticing postal regulations that were incorporated into the Code of Federal Regulations).

Woods' concern that the judicial notice potentially allowed the jury to convict her on impermissible grounds set forth by the Rule (such as for failing to tell customers that she was selling magazines or that they could enter the promotion without a purchase) is without merit. The district court explained to the jury that the defendants were not on trial [**19] for violating the Rule, and that violation of the Rule would not by itself constitute mail or wire fraud. The court also instructed the jury that the defendants were not on trial for any conduct or offense not charged in the indictment.

It is true that the district court instructed the jury that a defendant's failure to inform a customer of a material fact could support conviction if the defendant had an explicit statutory obligation to disclose the fact. And it is also true that, in closing argument, the government told the jury that it could consider that the Rule imposed such a duty upon telemarketers. However, the district court's instruction and the government's closing argument correctly reflect that a scheme to defraud may be based on a nondisclosure "when there exists an independent duty that has been breached by the person so charged. This independent duty may exist in the form of a fiduciary duty to third parties, or may derive from an independent explicit statutory duty created by legislative enactment." United States v. Dowling, 739 F.2d 1445, 1449 (9th Cir. 1984) (internal citations omitted; emphasis added), *rev'd on other grounds*, 473 U.S. 207, 87 L. Ed. 2d 152, 105 S. Ct. 3127 (1985). [**20] The Rule could properly serve as the basis for such a duty. It was adopted pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108, see 16 C.F.R. § 310.1, wherein Congress directed the FTC to prescribe telemarketing rules and requirements, see 15 U.S.C. § 6102(a). The duties created by the Rule were therefore "derived from an explicit and independent statutory requirement." *Dowling*, 739 F.2d at 1450.

C. Woods' Sentence Enhancements

Woods contests two sentencing enhancements applied by the district court that had the effect of lengthening her sentence. We review the district court's factual findings at sentencing for clear error. *United States v. Collins*, 109 F.3d 1413, 1420 (9th Cir. 1997). Those factual findings must be supported by a preponderance of the evidence. Id.

1. The "Manager or Supervisor" Enhancement

The district court increased Woods' offense level by three levels for having been a manager or supervisor at MTI. The enhancement applied if Woods "was a manager or supervisor . . . and the criminal activity [**21] involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(b) (2002). Woods must have managed or supervised one or more other participants. U.S.S.G. § 3B1.1 cmt. n.2. "A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1 cmt. n.1. The enhancement was improper because [*1002] the record fails to show that Woods managed or supervised at least one other participant.

At sentencing, the government identified only four participants besides Woods: Flarida, Garcia, Rachel Bennett, and William Maloney. n5 The government does not contend that Woods managed or supervised Flarida. Thus, the enhancement was proper only if Woods managed or supervised Garcia, Bennett, or Maloney, all of whom were closers. But the record does not indicate that Woods managed or supervised any closer. The only activity the government identified in specific relation to closers was that Woods referred customers back to closers for reprepping. This activity was not managerial or supervisory in nature, however. It was simply part of Woods' role as a verifier.

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n5 Maloney, a cooperating defendant, worked at MTI from the middle of 1995 until the middle of 1996.

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[**22]

Because all of the other participants identified (besides Flarida) were closers, and because the record fails to show that Woods managed or supervised any closer, a preponderance of the evidence does not establish that Woods managed or supervised any other participant. Application of the enhancement was thus clearly erroneous.

2. The Enhancement for Violation of a Judicial Order

On October 20, 1997, a judicial injunction was entered prohibiting Flarida from selling any magazine, engaging in any prize promotion, or owning any business entity that sold a magazine or engaged in a prize promotion. It also prohibited Flarida and "his agents, employees, officers, servants, and attorneys, and those persons in active concert or participation with him, who receive actual notice of [the injunction] by personal service or otherwise," from making material false representations or violating the Telemarketing Sales Rule. (Emphasis added.) In sentencing Woods, the district court applied a two-level enhancement on the ground that her offense violated the injunction. At the time of sentencing, such an enhancement was appropriate for offenses involving the "violation of any judicial . . . [**23] injunction." U.S.S.G. § 2F1.1(b)(3)(B) (1997).

Woods contends that the injunction did not apply to her because she lacked actual notice of it. We agree with Woods that the record fails to demonstrate actual notice. Circumstantial evidence established that Flarida and Woods had known each other for many years and had worked together at MTI and North Star. There was also evidence that Woods had falsely claimed to have received money from NSP that had actually been paid to Flarida. Considered together, this evidence supported an inference that Woods knew that Flarida had been under investigation and possibly that Flarida was hiding something, but that does not mean that Woods was told of or knew about the court's injunction. Because a preponderance of the evidence does not establish that Woods knew of the injunction, application of the enhancement was clearly erroneous.

III. CONCLUSION

In No. 01-50539, the judgment of conviction is affirmed, the sentence is vacated, and the case is remanded to the district court for resentencing consistent with this opinion. In No. 01-50618, the judgment of conviction is affirmed.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

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